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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

APPELLANT'S BRIEF IN ANSWER TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM.

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Appellees.

APPELLANT'S BRIEF IN ANSWER TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM.

As permitted by Rule 7, paragraph 3, of the Rules of this Court, appellant submits this brief in answer to appellees' Statement Opposing Jurisdiction and Motions to Dismiss or Affirm, served and filed on May 10, 1944, in opposition to appellant's appeal taken on April 22, 1944, and its Jurisdictional Statement filed on the same date.

In summary, appellees claim "that no federal questions are presented," or that, if federal questions are involved,

they are unsubstantial. Appellant's Jurisdictional Statement anticipated most of their principal claims, and therefore, this answer is restricted mainly to the errors of their argument. It will follow the titles used in their statement.

Statement of Case, Grounds of Plaintiff's Cause of Action, and History of Proceedings.

Appellees' comment under these three titles does not differ basically from that given by appellant, except as follows:

1. Appellees emphasize that the action to recover as damages the purchase price of stock, sold in violation of the registration provisions of the Blue Sky Law, was an action in tort. As we already have shown (p. 16 of Jurisdictional Statement), if "tort" be the correct descriptive word, such tort arose only from breach of a duty imposed solely by statute and not because of violation of any common law obligation. The Minnesota Supreme Court at all times has so held in identical actions to recover the purchase price of stock sold in violation of that statutory duty. That court likewise so held on both appeals of this very case.[1] So did the Eighth Circuit Court of Appeals in the similar cases of *City Co. of New York* v. *Stern* (1940), 11 Fed. (2d) 601, and *Chase Securities Corporation* v. *Vogel* (1940), 110 Fed. (2d) 607 (set forth in Appendix "A" of Appellees' Statement). But for the statute, there could have been no liability, in tort or otherwise, for non-registration of the stock.

[1] On page 10 of Appellees' Opposing Statement, it is erroneously said that the State Court held the action was in tort "(and not upon a 'liability created by statute')". Nowhere in the opinion is the quoted matter given. Rather the court described the action as one in tort for recovery of the purchase price of stock sold in violation of the securities act. In the first appeal, the same action was expressly called a suit "upon a liability created by statute".

The important question is, not whether the action was one in tort, but whether the action here involved was based "upon a liability created by statute." Every court decision, expressly or in legal effect, has held it to have been of this specific character.

2. Appellees refer to the limitations statute, Mason's 1927 Minn. Stat. Section 9191, subdiv. 2, which was held applicable to this action for breach of statute on the first appeal, *Donaldson* v. *Chase Securities Corporation*, 209 Minn. 165, as being a "general" six-year statute of limitations. It is "general" only in the sense of not being specifically limited to Blue Sky actions. In every other sense, it is "special" in that it expressly covers *only* actions "upon a liability created by statute." (See. Appendix A, p. 29, Jurisdictional Statement.) It is plainly not a "catch-all" limitations provision, applicable to any kind of action, such as on contract or on tort for breach of a common law duty, or on any other obligation "as to which no other limitation is expressly prescribed".[2] This distinction is necessary to a clear understanding of the precise legal question involved.

3. Appellees say that the complaint alleged only one cause of action, having four separate grounds. Regardless of the inartistic and jumbled form of that pleading, plaintiff in reality and in law stated two separate causes of action; one for recovery based on pure breach of the registration law, and the other for fraud in sale representations. The first decision of the trial court rightly declared the statutory claim to be "independent" of the fraud claim (See Par. XXVI, Findings of Fact, Conclusions of Law and Order for Judgment, dated April 18,

[2] Such a "catch-all" limitations provision in the Minnesota law is Mason's 1927 Minn. Stat., Sec. 9191, sub. 1 (See Jurisdictional Statement, Appendix A, p. 29).

1940). The state supreme court reviewed the decision on that basis alone. Appellees thereafter proceeded on the "fraud" claim as an independent cause of action, until after the 1941 law was enacted. Those two causes of action remained separate through the adjudication from which this appeal is taken. They are still separate and distinct.

4. The variously stated additional "grounds" of recovery and the findings thereon of the trial court are all upon the "independent" cause of action for fraud. They are entirely immaterial on this appeal, as the state supreme court's own opinion clearly states.

I.

That Adherence to Campbell v. Holt Denies Appellant Due Process of Law.

a. *The Inapplicability of Campbell v. Holt:*

In its Jurisdictional Statement (pp. 16-18), appellant has urged that the case at bar is governed by the legal principles of *Davis* v. *Mills*, (1904) 194 U. S. 541, 48 L. Ed. 1067, 24 S. Ct. 692 (involving an action to recover a liability upon corporate directors for violation of a statute) and *Danzer & Co.* v. *Gulf & Ship Island Ry. Co.*, (1924) 268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612 (involving an action for damages for breach of duty imposed by statute), rather than by the case of *Campbell* v. *Holt*, (1885) 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, which involved an action for breach of a common law obligation on contract to pay money.

It is significant that appellees do not attempt to analyze and distinguish the *Davis* case; and their comment concerning the *Danzer* case is inadequate. Our original argument on these cases, which we need not here repeat, remains unanswered.

The limitations statute here applied, Mason's 1927 Minn. Stat. 9191, *subdiv. 2*, is not a "general" limitations in the sense in which that term was used in *In Re Daniels*,[3] (1940) 208 Minn. 420, 294 N. W. 465, or an "ordinary" statute of limitations as the term was applied in *Kannellos v. Great Northern Ry. Co.*, (1922) 151 Minn. 157, 186 N. W. 389, to the limitations provision involved in *Campbell* v. *Holt*. Rather, its own language, expressly relating only to actions "upon a liability created by statute", shows it to be a specific statute of limitations. It is substantially as restrictive as the limitations provision involved in *Davis* v. *Mills*, which was held to condition the liability founded on a separately enacted statute rather than to affect the remedy alone.

We quite agree with appellees that there is a "difference between *Campbell* v. *Holt* and the *Danzer* case" (Appellees' Opposing Statement, p. 14). That difference is of vital importance here. The State Supreme Court's erroneous application of the *Campbell* case to sustain a legislative revival of a barred statutory cause of action raises a substantial federal question under the due process clause.

b. *The Error of Campbell v. Holt, Were It Applicable*:

Appellant's argument as to the limited applicability of *Campbell* v. *Holt*, and the need for re-examination of its doctrine on the ground of public policy, remains unmoved by appellees' statement and lengthy citation of inapplicable cases.

We again repeat what we there said (Jurisdictional Statement, pp. 18-19), that in only three states, (Connecticut, New Mexico, and Washington) has the majority rule of *Campbell* v. *Holt* been accepted in cases not

[3] The Court specifically pointed out that the Iowa limitations statute did not in terms apply to wrongful death actions; rather it covered all types of actions for injuries, whether based on contract or tort and, consequently, did not condition rights (208 Minn. at p. 429).

involving special circumstances; and in none of those was the action one based upon the violation of a statute. Excluding the decision of the Minnesota Supreme Court in the case at bar, the other five cases (of the nine claimed) contain only dicta reference to the *Campbell* case or involved special situations where the *Campbell* rule was cautiously applied and approved only as to the peculiar facts of each case.[4]

Appellees' terse statement that the Federal Courts "have never departed" from *Campbell* v. *Holt* contains a misleading implication, especially when it is applied to an action such as is involved in the case at bar. *All* of the cases cited for that claim (Appellees' Opposing Statement, pp. 19-20), merely confirm what appellant originally said (Jurisdictional Statement, p. 20)—that the federal courts have followed the *Campbell* case only as to a special statute[5] enacted in favor of the United States to enable collection of tax claims which had become

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[4] *Jackson Hill Coal Co.* v. *Commissioners* (1941), 181 Ind. 335, 104 N. E. 497, and *Aaron* v. *City of Tipton* (1941), 218 Ind. 227, 32 N. E. (2) 88 (mistakenly cited by appellees as *Hillger* v. *Boyd*), held that in actions against subdivisions of the state, the legislature may constitutionally alter limitations periods or revive barred claims.

In *Evans Products Co.* v. *Fry* (1943), 307 Mich. 506, 12 N.W. (2) 448, the *Campbell* case was approved "as applied to our construction of Act 170 (an escheat law) under the circumstances of this case". The broader principle against revival, declared by the earlier Michigan case of *Lohrstorfer* v. *Lohrstorfer* (1905), 140 Mich. 551, 104 N. W. 142, remains unchanged.

Beckin v. *Healy* (1916), 52 Mont. 398, 158 Pac. 1020, involved only a suit to cancel an outlawed mortgage. *Bates* v. *Collum* (1896), 177 Pa. 633, 35 Atl. 861, held a newly enacted tolling statute applicable to a previously accrued cause of action on contract against a non resident. In both cases, brief comment on the *Campbell* case was dicta and related only to revival of a barred *debt*.

McEldowney v. *Wyatt* (1898), 44 W. Va. 711; 30 S. E. 239, approved the *Campbell* case only to allow recovery of a barred claim for taxes, the opinion pointing out that "taxes are not a contract or a debt".

[5] All federal cases involved the same statute, Sec. 611 of Rev. Code of 1928 (26 U.S.C.A. Sec. 2611).

barred through "mistakes and defects in the administration of government". The special distinction in this kind of situation is aptly drawn by this Court in *Graham* v. *Goodcell* (1930) 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186, while adhering to the wisdom of a contrary rule in ordinary transactions between two persons. Similarly, a special enactment by Congress "to cure a fault of administration" of a federal compensation act was sustained by this Court on the principle and authority of the *Graham* case, it being noted especially that the result affected only an administrative order rather than a prior "judicial judgment". *Paramino Lumber Co.* v. *Marshall* (1940) 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600.

Appellees must agree with appellant that such "special situation" cases as *Robinson* v. *Robins Dry Dock & Repair Co.*, (1924) 238 N. Y. 271, 144 N. E. 579, *Danforth v. Groton Water Co.*, (1901) 178 Mass. 472, 59 N. E. 1033, *Dunbar* v. *Boston & P. R. Co.*, (1902) 181 Mass. 383, 63 N. E. 916, and *Mulligan* v. *Hilton*, (1940) 305 Mass. 5, 24 N. E. (2) 676, afford no support to their position unless the case at bar could be placed in that special category. But no claim is made that the facts here impel the result attained in those cases. Appellees' testate at all times had her six full years within which to commence the action. She slept on her rights for more than two years *after* that regular limitations period and gave no worthy reason why she did not sue within the regular time. She was not confused by any change in the prevailing law; she did not claim any technical oversight in precedural matters, or that the originally allowed six years was not reasonable, or that any special hardship existed. In other words, not one of the special circumstances found in the "special situation" cases was present or claimed here.

Appellees' effort to justify the revival on the ground that they had two separate remedies for violation of the

securities law, only one of which was barred by the first appeal, is likewise without merit. The Minnesota cases are unanimous in their view that a buyer has only one cause of action and *one* remedy for the seller's breach of that law—an action to recover the purchase price of the security sold without registration (Jurisdictional Statement, p. 16 and footnote). That cause and remedy were asserted in the trial here and were the sole basis of the first appeal. The State Supreme Court held them barred. That adjudication totally ended that cause of action and remedy, as appellees themselves conceded when, on remand, they asked only for findings on the remaining cause of action for fraud. The latter cause of action was obviously not another remedy for the same violation of statute; it was an entirely different claim, existing independently of the violation of statute, as the trial court, in its decision of April 18, 1940 (Par. XXVI), properly held.

Even the Minnesota Supreme Court, in twice deciding this case on the statutory violation claim alone, did not suggest in either opinion that there were two remedies for the same breach of statute. Rather, the opinion from which this appeal is taken discussed *Kipp* v. *Johnson*, (1884) 31 Minn. 360; 17 N. W. 957, and observed by way of distinction from the case at bar, that there "plaintiff had another remedy that had not been barred by the statute", and that, nevertheless, revival of the cause of action was proper "even if there be no other remedy". The revival cannot be sustained on the "two-remedy" principle of the *Kipp* case.

c. Public Policy and Campbell v. *Holt:*

Appellees' emphasis on the "important considerations of public policy" with reference to the rule of *Campbell* v. *Holt*, admits the presence in this case of a federal question

of substance. As appellant's summary statement said (Jurisdictional Statement, pp. 13-14), it is extremely important that this Court determine the power of a state legislature, under the due process clause, (a) to reverse a final judgment of the highest state court in a given case and as to a party in whose favor the judgment was entered, and (b) to revive a cause of action founded on violation of statute, years after the action had become barred by all existing law.

Appellees' reasons of so-called public policy against the discard of *Campbell* v. *Holt*, as applied to ordinary transactions or liabilities founded on statute, are either wholly inapplicable or without substance:

(1) As to the "established doctrines" of revival by a new promise in writing or part payment, those doctrines are statutory exceptions and, by judicial disfavor, are limited to contract obligations or debts *only*. They are not applicable to tort actions, as appellees insist this action is. *Olson* v. *Dahl*, (1906) 99 Minn. 433, 109 N. W. 1001. Furthermore, the theory supporting them is one of *new* liability rather than revival of the old obligation, *Willoughby* v. *Irish*, (1886) 35 Minn. 63, 27 N. W. 379. These and other "doctrines," if desirable, could be left unchanged by proper judicial language excepting them.

(2) As to the constitutional power to revive actions by the government to collect taxes, there is already adequate judicial authority in such cases as *Graham* v. *Goodcell* and *Paramino Lumber Co.* v. *Marshall*, *supra*, neither of which is dependent upon the rule of the *Campbell* case.

(3) The so-called "injustice" cases must necessarily stand on their own peculiar facts and circumstances as to which, if necessary, the rule of the *Campbell* case might well be limited.

(4) The retrospective change of rights and remedies by legislatures raises a question of public policy which is

vastly affected by whether or not the action has already become barred by all existing law. Whether legislatures can be trusted not to abuse a power to revive claims barred years before, is indeed a vital matter of public law.

The public policy in favor of the permanent barring of "ancient claims", so strongly urged by Justices Bradley and Harlan in the dissenting opinion of *Campbell* v. *Holt*, had been established by this Court more than fifty years before that case, when, through Mr. Justice Story in *Bell* v. *Morrison*, (1828) 26 U. S. (1 Pet.) 351, at 360, 7 L. Ed. 174, at 178, the statute of limitations was described as "'a wise and beneficial law" designed "to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses." That approval has been reaffirmed in numerous cases, such as *Campbell* v. *Haverhill*, (1894) 155 U. S. 610, 617, 39 L. Ed. 280, 15 S. Ct. 217, and *Guaranty Trust Co. of N. Y.* v. *United States*, (1937) 304 U. S. 126, 82 L. Ed. 1224, 58 S. Ct. 785. Recognition of legislative power to revive causes of action barred ten or twenty years ago[6] would defeat that public policy, acknowledged and respected by this Court for more than a century, and would lead to innumerable abuses and legally undesirable consequences which here need only be suggested.

Sixty years' experience with *Campbell* v. *Holt* has demonstrated that the majority of the state courts have rejected its rule. Furthermore those sixty years have also shown what appellees do not and cannot deny; that the majority of the legal analysts and authorities have rejected it, both as a matter of legal principle as well as of public policy; that this Court has never re-affirmed it in a case involving

[6] As the statute in the case at bar was construed, it revived for one year *all* causes of action for violations of the securities law occurring since it was first enacted in 1917.

revival of a cause of action founded either on statute or on common law debt or contract; and that some of the lower federal courts have approved it only to sustain the revival of tax collection claims, which by the later decision of this Court in *Graham* v. *Goodcell, supra*, confirmed such result in that restricted situation, but without citing or relying upon the *Campbell* case or its doctrine.

This should be enough to justify a re-examination of that case by this Court.

II.

That 1941 Law, as Construed and Applied, Denies Due Process Because Appellant Had "Vested Right" in Judgment of Reversal on First Appeal.

Appellant's authorities on this point (Jurisdictional Statement, pp. 14-15) are not questioned by appellees. Appellees seem to admit that if the adjudication of the action for violation of the registration law was final on the first appeal, the legislature could not constitutionally abrogate appellant's vested right therein. Their sole answer is that that adjudication was not final.

The record is simple. The trial court by findings of fact, conclusions of law and order for judgment, dated April 18, 1940, held that the stock sales were in violation of the registration provisions (Par. XV and XVII); this was the only basis of recovery there decided (Par. XXVI). Judgment for appellees was entered on June 18, 1940. On appeal, the State Supreme Court on March 7, 1941, entered a judgment reversing the trial court judgment. (Jurisdictional Statement, pp. 41-42). The opinion of January 10, 1941, said as to the issues remaining:

> "This record indicates the presence of issues other than that of the tolling of the statute of limitations. If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result."

Appellees repeatedly say that only the so-called "tolling" question was thereby decided. A reading of the opinion (or the opinions in the *Stern* and *Vogel* cases) shows that that adjudication necessarily included an adjudication that the cause of action was barred by the limitations statute, else the question of tolling would have been wholly moot. The only issue or cause of action which could possibly have remained was one for alleged fraud. Even appellees so construed the Supreme Court's language because their next step in the trial court was a motion for findings on the *fraud* claim only.

The state Supreme Court has always held that the effect of a reversal depends on the grounds of the reversal as expressed in the court's opinion. As said in *Jordan v. Humphrey* (1884), 32 Minn. 522, 21 N. W. 713:

> "A judgment may be reversed upon grounds which show that it is impossible for plaintiff to recover. In such case a new trial would be useless, and the reversal is in effect an end of the case."

This is clearly the situation here, as to the claim for violation of the Blue Sky Law.

On this undisputed record, it is inconceivable that appellees could have successfully re-commenced an action on that claim—else there would never be an end to litigation. As this Court said long ago in *United States v. Leffler* (1837), 11 Pet. (U. S.) 86, at 100-1, 9 L. Ed. 642:

> "If there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action in the language of the law, *transit in rem judicatum*, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever."

See, also, *Hamer v. New York Railways Co.* (1916), 244 U. S. 266, 61 L. Ed. 1125, 37 S. Ct. 511.

Inasmuch as the facts upon which the state Supreme Court in its decision of January, 1941, determined that appellees' action was barred were not in controversy, the decision was substantially that of a judgment entered on a demurrer to the pleading. In fact, that was precisely the situation in the companion case of *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 296 N. W. 518. There are numerous cases of this Court holding that a decree dismissing a complaint as a matter of law, on grounds apparent on its face, is a conclusive adjudication on the merits, *Lawrence* v. *Nelson* (1891), 143 U. S. 215, 36 L. Ed. 130, 12 S. Ct. 440; *Lyon* v. *The Perin and Gaff Mfger. Co.* (1887), 125 U. S. 698, 31 L. Ed. 839, 8 S. Ct. 1024. It is just as much so as a judgment rendered upon proof. In both cases, such a judgment is res adjudicata. *Northern Pacific Ry. Co.* v. *Slaght* (1906), 205 U. S. 122, 51 L. Ed. 738. See Annotations in *13 A. L. R. 1104*, supplemented in *106 A. L. R. 437*.

Even the case recurrently cited by appellees, *City of Aurora* v. *West* (1868), 7 Wall. (U. S.) 82, 19 L. Ed. 42, holds, contrary to their apparent analysis, that a judgment entered on a demurrer is a final judgment and is res adjudicata as to a new action upon the same cause between the same parties. Any other rule would be preposterous.[7]

The other case cited, *Hickey* v. *Johnson* (1925, C. C. A. 8th Cir.) 9 Fed. (2) 498, likewise approved the rule that a judgment on demurrer is as conclusive as one rendered upon proof, where the grounds stated involve the merits.[8]

Appellees' claim that the first appeal decided nothing on the merits of the cause of action for violation of statute and that, on remand, the case stood "as if no trial had been

[7] The portion of that opinion quoted by appellees is part of a hypothetical discussion, qualified in the very next sentence by reference to intermediate procedural orders as distinguished from decisions on the merits.

[8] The portion of the opinion quoted by appellees refers only to a rule of trial practice under Oklahoma law.

had" is obviously in error. So, also, is the statement that the 1941 law did not change the rule of law announced on the first appeal (Appellees' Opposing Statement, p. 29). Both are contrary to the clear language of the State Court's opinion.

Furthermore, this Court has already ruled that the first appeal did decide finally the cause of action for violation of statute. In *Chase Securities Corporation* v. *Vogel* (1941), 312 U. S. 666, 85 L. Ed. 1110, 61 S. Ct. 823, on the basis of these same adjudications by the State Court in this and the companion *Pomeroy* case on the first appeal, the lower court judgment on the statutory cause of action was reversed and the case was remanded to the Circuit Court of Appeals "for further proceedings with respect to any question not determined by the Supreme Court of Minnesota in the Pomeroy and Donaldson cases."

Equally unfounded is the related argument that this cause of action was pending after the remand and when the 1941 law was passed.[9] Not one of the *Minnesota* cases or the decisions of this Court (or of any court) cited by appellees sustains such a claim. In all of them the actions were obviously pending, prior to trial or upon appeal. The case at bar was not pending as to the cause of action for violation of statute, after the judgment on the first appeal. The reversal merged the claim in the adjudication and put an end to that phase of the case, just as much as if it had been the subject of a formally stated separate action. The fact that the case continued on as to "any question *not* determined" by that appeal could not give life and pend

[9] This argument rests fundamentally on the claim that because both causes of action were pleaded in jumbled form in the one complaint, the adjudicated cause continued to pend merely because further proceedings were allowed as to the other cause of action (fraud). Obviously, appellees' inartistic pleading cannot affect the separate legal status of the two causes of action, or form the basis of a ground for denying the existence of a real and substantial federal question.

ency to the question which, as this Court said, had been finally determined.

Even assuming that a legislature may have the power to alter the rights of parties as they are involved in a *pending* case (such as *Carpenter* v. *Wabash Ry. Co.* (1939), 309 U. S. 23, 84 L. Ed. 558, 60 S. Ct. 416), none of such cases is applicable to the finally adjudicated cause of action at bar. Nor does any one of such cases cited by appellees (Opposing Statement, pp. 34-35) so much as intimate that this phase of the case was pending after March 7, 1941, when judgment of reversal was entered. Rather, subsequent to that date, such judgment could not be collaterally attacked by legislative act, *McCullough* v. *Virginia* (1898), 172 U. S. 102, 43 L. Ed. 382, 19 S. Ct. 134, or by a separate judicial proceeding, *Larkin* v. *Paugh* (1927), 276 U. S. 429, 72 L. Ed. 638, 48 S. Ct. 366; *Chicot Co. Drainage District* v. *Baxter State Bank* (1939), 308 U. S. 371, 84 L. Ed. 329, 60 S. Ct. 317.

The judgment on the first appeal was final and decisive of the cause of action for breach of statute. Appellant's vested right therein was taken away by the 1941 law, as construed and applied by the Minnesota Supreme Court.

III.

That 1941 Law, As Construed and Applied, Denies Appellant Equal Protection of the Laws as Guaranteed by the Fourteenth Amendment.

Appellees do not question the validity of appellant's authorities holding that this Court is bound by the specific construction and application of the statute as given it by the state supreme court. It is entirely immaterial that the statutory language itself, being general in form, could have been given some less objectionable or broader construction and application. (Jurisdictional Statement, pp. 21-22).

The sole question on this point is whether the statute, as construed and applied by the state court, is unreasonable, arbitrary and discriminatory. If so, there has been a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment.

We again submit that the opinion shows just such an unconstitutional construction and application as against appellant and National City Company. (See excerpt in Jurisdictional Statement, page 21.) It plainly appears, so the state court said:

> —that the legislature acted promptly after the first opinion which was in favor of these two corporations;
>
> —that the legislature "was dissatisfied with the law" made in that opinion;
>
> —that the legislature "regarded it as unjust to numerous plaintiffs who had bought *this* stock" and had cases pending or causes of action thereon.
>
> —that the legislature knew of a multitude of sales of this stock in Minnesota in 1929 and that the "great bulk of the violations" of the law occurred prior to the crash in 1929.
>
> —that "if the clause * * * were to be interpreted as defendant contends, it would apply to few, if any, cases".

Within this array of finding of specific legislative intent against appellant and National City Company, there is only one incidental reference to "other unregistered stock", concerning which there was no proof in the record. Surely those three words could not alter the clear construction and interpretation of two lengthy paragraphs that the law was intended to apply only to these corporations and to purchasers of "*this stock*", in order to overcome the claimed injustice of the prior decision. The language is specific. The court was not pointing out, as appellees say,

only "*some*" of the circumstances which it believed led to the enactment of the law; it was pointing out *all* of such circumstances in a deliberate manner.

Its reference to such extraneous matter (the truth of which we deny) was determinative and vital to the decision, not merely confirmatory of the statutory language, as appellees claim. This is apparent in at least two respects: (1) the length, particularity, and emphasis placed on the circumstances enumerated by the court, and (2) its reliance on such circumstances to support its conclusion that the law must be construed as though the word "provided" had not been used by the legislature. In other words, the inference is plain from this opinion that such reference was necessary, not to clarify and confirm, but rather to *remake* the purportedly "clear" statutory language in order to reach the desired result. Without such reference, it could not have escaped the actual words of the statute.

This question of denial of equal protection was seasonably raised on the petition for rehearing. Until the opinion of the State Supreme Court no one anticipated the construction of the 1941 law which was there given. Appellees never argued for such a restricted construction, orally or by brief. Even now they seek to disclaim it. No evidence was ever taken on the question to indicate the possible findings of legislative intent so made. The trial court made no such finding of intent, its determination on the applicability of that law being limited to one short paragraph (Third paragraph of Finding XXXII, quoted in Jurisdictional Statement, p. 7), which, on motion for a new trial, dated September 8, 1942 (by paragraph No. 13) the trial court refused to clarify by elaboration.

Such unusual and unexpected disposition of the question of legislative intent brings this case within the principle

of such cases as *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, (1930) 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326, and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, (1930) 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, where the federal questions were raised for the first time on petitions for rehearing before the state supreme courts and where it could "not reasonably be held that the company was bound to anticipate such a construction". In both said cases, the state courts denied the petitions for rehearing without opinions; yet this court held such questions seasonably raised.

The 1941 law was construed by the state court to be a special law against this appellant. That construction is binding on this Court. Appellant thereby was denied equal protection.

IV.

That Appellant Was Denied a Fair Trial.

Appellees' principal answer to this claim is that appellant did not seasonably urge this federal question and that, if it did, the state court did not and could not base its decision on findings of legislative intent drawn from "extraneous materials".

That appellant raised the fair trial question at its first opportunity has already been fully shown (Jurisdictional Statement, pp. 24-25). It is said that appellant could have offered evidence on the issue of legislative intent to the trial court—yet it is not shown how or where this could have been done. The trial of the case was had and closed two years before. We did all that established Minnesota trial practice allowed, in making a motion to clarify the court's ambiguous finding with respect to the applicability of the law, and in the alternative, for a new

trial. Both motions were denied. Furthermore, until the state supreme court had based its decision primarily on the question of intent, as to which there was absolutely no evidence introduced in the record, such construction of the law, as we have said, was entirely unanticipated by both sides. Appellees themselves did not contend for such a narrow construction. The matter of proof of the issue of intent, by facts, and circumstances outside the record (as distinguished from the question of legislative intent as disclosed by the statutory language itself), was in reality not involved in the case until that decision. Appellant then proceeded promptly as to it, on its petition for rehearing. The decisions just cited, showing timeliness in presentation of the equal protection question at such stage of the state court appeal, are applicable and decisive here also.

It seems a bit incongruous that, in the face of the supreme court's obvious reliance on so-called background "circumstances" to sustain its construction of the law, (as shown above under Section III), appellees should now argue that such matters were "inadmissible" and that any evidence of them "could not have been received." They take the inconceivable position here that the state court can refer to and rely on such matters, provided that no evidence thereon is admitted in the case. The very case they cite, *United States* v. *Missouri-Pacific Ry. Co.*, (1928) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133, supports a contrary conclusion where, as here, the literal language of the law would "lead to absurd or impracticable consequences."[10] The fact remains that the state supreme court did resort to such extraneous circumstances, as a matter of judicial

[10] As appellant argued in the state supreme court, the construction here approved would revive for one year *all* causes of actions for violation of the state securities law *since its enactment in 1917*.

notice as appellees' argument seems to concede, without giving appellant the slightest opportunity to ascertain the "facts" so used and to offer proof of contradicting facts. This is a violation of the clearly stated principle of *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724. (Jurisdictional Statement, p. 26.) Appellees do not challenge the rule of that case or its applicability here.

Appellees also argue that proof of the kind appellant offered (legislative records, on affidavit of a chief proponent of the proposed law, and affidavits of two legislators on the judiciary committee who examined the bill) is not competent proof of legislative intent. The quoted language from the case of *United States* v. *Trans-Missouri Freight Association* (1896), 166 U. S. 290, 41 L. Ed. 1007, at 1020; 17 S. Ct. 540, is dicta; the opinion shows that debates and reports from various members of Congress were received and considered. This is the modern trend.

In numerous cases, this Court has fully examined and relied upon statements from individual members of Congress, both proponents and opponents of bills, to determine the intent and purpose of an act. See for example, *Helvering* v. *Griffiths* (1943), 318 U. S. 371, 87 L. Ed. 843, 63 S. Ct. 636; *United States* v. *Wrightwood Dairy Co.* (1942), 315 U. S. 110, 86 L. Ed. 726, 62 S. Ct. 523; *United States* v. *Dickerson* (1940), 310 U. S. 554, 84 L. Ed. 1356, 60 S. Ct. 1034; *United States* v. *Dotterweich* (1943), — U. S. —, 88 L. Ed. 74, — S. Ct. —. The same rule prevailed in Minnesota at the time this case was before the state supreme court. *Barlau* v. *Minneapolis-Moline Power Co.* (1943), 214 Minn. 564, 9 N. W. (2) 6. In all events, if the state Supreme Court believed it necessary to discuss and rely on such details of legislative intent, the parties should have the right to submit all available proof on the

issue. Otherwise, legislative intent would indeed be a fiction, incapable of any factual contradiction.

Finally, it is said that the foregoing presents no federal question because the construction and interpretation of a state law, or a question of admissibility of evidence, is solely for the highest state court to determine. Such a claim totally ignores a fundamental rule that even though the ultimate question is one of state law, the adjudication of that question must afford both parties a fair opportunity to be heard. If such opportunity is denied, a federal question under the due process clause is present. Thus, in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra*, the interpretation of a Missouri state tax law was admittedly one solely for the courts of that state. The state court judgment was reversed, however, because a fair trial had not been granted appellant. This Court said:

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare Postal Teleg. Cable Co. v. Newport, 247 U. S. 464, 475, 476, 62 L. ed. 1215, 1220, 1221, 38 Sup. Ct. Rep. 566."

See also, *Baltimore & Ohio Ry. Co.* v. *United States* (1925), 268 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797. Appellees' cases presuppose a fair trial and full opportunity to be heard. They are not here in point.

The State Court's opinion demonstrates the determinative importance of the issue of legislative intent. Appellant

has not yet had an opportunity to present evidence on that issue. A fair trial has been denied, and, thereby, a substantial federal question is presented.

Conclusions.

For all the reasons given in our Jurisdictional Statement, we respectfully submit that appellees' motions to dismiss or affirm be denied and that this appeal be allowed.

Dated: May 27, 1944.

Respectfully submitted,

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